

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

**CHARLES KELLY**, on behalf of himself  
and all others similarly situated,  
Plaintiff,

v.

**COMMUNITY BANK, N.A.**  
Defendant.

Case No. 8:19-CV-0919 (MAD/CFH)

**PLAINTIFF’S MOTION TO AMEND  
COMPLAIN IN RESPONSE TO  
DEFENDANT’S MOTION TO  
DISMISS**

Pursuant to Fed. R. Civ. P. 15(a)(2) and L.R. 7.1(a)(4), Plaintiff hereby moves the Court to allow him to amend the Complaint in this action, and in support thereof states as follows

Plaintiff seeks leave to amend the complaint for the first time, prior to Defendant’s Answer, to make several important changes to his Complaint. First, as urged by the Court during the pre-motion conference, Plaintiff has considered certain informal discovery regarding Defendant’s contention that Plaintiff lacks “standing” with respect to one alleged theory of liability. While the information provided is not dispositive and would ultimately require further discovery, Plaintiff’s proposed Amended Complaint removes Plaintiff’s claim regarding the theory of liability that Defendant challenged on the basis of standing. This approach is judicially efficient, and will spare the Court from having to consider briefing, and render a decision on, Defendant’s Rule 12(b)(1) motion.

An additional change in the proposed Amended Complaint is the addition of a new Plaintiff who will pursue the same theory of liability on behalf of putative classes. The last additional change is to add an theory of recovery on behalf of a third Plaintiff.

This proposed Amended Complaint is filed as a response to, and renders moot, Defendant’s current Motion to Dismiss. (Dkt. 35).

Plaintiff is also modifying its causes of action in the original complaint as a response to the currently pending Motion to Dismiss. (Dkt. 35.)

Plaintiff proffers that given that there is a cause of action that was not raised in the original and operative complaint, and additional plaintiffs who seek to bring claims, these claims must now be raised in the interest of justice. The court “should freely give leave when justice so requires.” *Bader v. Special Metals Corp.*, 985 F. Supp. 2d 291, 303 (N.D.N.Y. 2013).

This is the first request to amend a pleading, that Plaintiff has sought in this action, and the request is made in good faith. Defendant will not be prejudiced in any way by the filing of Amended Complaint, as the case is still in the Motion to Dismiss stage. *Compare Walton v. Waldron*, 886 F. Supp. 981, 983-84 (N.D.N.Y. 1995).

While normally, a first attempt to amend the complaint while a motion to dismiss was pending would be as of right under Rule 15, here, Plaintiff is operating under the briefing schedule it had agreed to with Defendant. Technically, more than 21 days has passed since the Motion to Dismiss was filed, thereby occasioning this Letter Motion. Plaintiff attempted to gain Defendant’s consent to file a stipulated motion, but Defendant refused.

A redline showing the Amended Complaint compared to the original complaint is attached as Exhibit “A.”

WHEREFORE, Plaintiff requests the following relief:

1. The Amended Complaint attached hereto is accepted as the operative Pleading, and Plaintiff is granted 7 days to file the Amended Complaint with the Court;

2. Defendant's Motion to Dismiss the original complaint (Dkt. 35) is denied without prejudice, with leave to file a motion to dismiss in response to the Amended Complaint.

Dated: December 15, 2019

Respectfully submitted,

By: Jonathan M. Streisfeld  
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Jonathan M. Streisfeld (*pro hac vice*)  
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*Counsel for Plaintiff and the Proposed Classes*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 15, 2019, the foregoing document was served via electronic service on all counsel of record.

Respectfully Submitted,

/s/ Jonathan M. Streisfeld